

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
KENNETH ELLINGTON AND ESTATE OF)
HARRIET ELLINGTON, DECEASED)

Appearances:

For Appellants: Herbert Laskin
Attorney at Law

For Respondent: Richard A. Watson
Counsel

OP IN I ON

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Kenneth Ellington and Estate of Harriet Ellington, Deceased, against proposed assessments of additional personal income tax in the amounts of \$157.64, \$452.14, and \$452.27 for the years 1966, 1967, and 1968, respectively.

The issue in this case is whether certain monthly retirement payments received by appellant Kenneth Ellington were subject to the California personal income tax.

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During the entire appeal period, appellant and his late wife were California residents. Prior to their move to California on May 27, 1965, they were residents of the State of New York where appellant had been employed by Republic Aviation Corporation. Upon his retirement on November 1, 1964, appellant became eligible for benefits under the corporation's contributory retirement plan. He elected to receive a lifetime annuity for himself, payable monthly and without survivor benefits. The plan did not offer the option of a lump sum payment upon retirement.

Appellant received his first retirement check on December 1, 1964, and has received regular monthly checks since then. By the end of 1966, he had recovered the entire amount of his contributions, plus an additional \$3,704. In 1967 and 1968, respectively, appellant received \$5,618 and \$5,473 from his retirement annuity. Because appellant and his wife failed to report any retirement income in their joint income tax returns for the years 1966, 1967, and 1968, respondent issued proposed assessments of additional income tax on the amounts received by appellant in excess of his contributions to the retirement plan.

Except as otherwise provided in the law, the California personal income tax is imposed upon the entire taxable income of every resident of California and upon the income of nonresidents which is derived from sources within California. (Rev. & Tax. Code, **§ 17041.**) In 'situations like the present one, where a taxpayer's residency status changes, section 17596 of the Revenue and Taxation Code provides:

When the status of a taxpayer changes from resident to nonresident, or from nonresident to resident, there shall be included in determining income from sources within or without this State, as the case may be, income and deductions accrued prior to the change of status even though not otherwise **includible** in respect of the period prior to

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such change, but the taxation or deduction of items accrued prior to the change of status shall not be affected by the change.

The accrual treatment referred to above applies even though the taxpayer may be on the cash receipts and disbursements accounting basis. (Cal. Admin. Code, tit. 18, reg. 17596.) When read together, sections 17041 and 17596 require that appellant pay California income tax on the retirement income he received while a resident of California, unless these funds accrued as income prior to the time appellant and his wife moved here.

Respondent's regulations provide, as do the federal income tax regulations and the case law, that under an accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy. (Cal. Admin. Code, tit. 18, reg. 17571(a); Treas. Reg. § 1.446-1(c) (1) (ii); Spring City Foundry Co. v. Commissioner, 292 U.S. 182 [78 L. Ed. 12001.]) **If there** are substantial contingencies as to the taxpayer's right to receive, or uncertainty as to the amount he is to receive, an item of income does not accrue until the contingency or events have occurred and fixed the fact and amount of the sum involved. (Midwest Motor Express, Inc., 27 T.C. 167, **aff'd**, 251 F.2d 405; San Francisco Stevedoring Co., 8 T.C. 222.)

In the instant case, the liability of the retirement plan to make any monthly payment to appellant was contingent upon his continued survival. In the past, where continued life was a prerequisite to the acquisition of retirement benefits, we have held that survival was a substantial contingency which prevented the accrual of pension income until it was actually received. (Appeal of Edward B. and Marion R. Flaherty, Cal. St. Bd. of Equal., Jan. 6, 1969; Appeal of Lee J. and Charlotte Wojack, Cal. St. Bd. of Equal., March 6, 1969; Appeal of Henry D. and Rae Zlotnick, Cal. St. Bd. of Equal., May 6,

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1971.) In accordance with these decisions, we hold that the retirement benefits in question, received by appellant while a California resident, are subject to the California personal income tax.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Kenneth Ellington and Estate of Harriet Ellington, Deceased, against proposed assessments of additional personal income tax in the amounts of \$157.64, \$452.14, and \$452.27 for the years 1966, 1967, and 1968, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 17th day of October, 1973, by the State Board of Equalization.

William W. Dunlop, Chairman
Robert J. Pease, Member
John A. Smith, Member
_____, Member
_____, Member

ATTEST:

W. W. Dunlop, Secretary